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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 172.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

CAMDEN IRON WORKS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

SAMUEL MADDOX,
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Supplemental Brief on Behalf of the Defendant in Error, Being a Reply to the Brief of Counsel for the Plaintiff in Error.

The first proposition presented by the counsel for the plaintiff in error is that the Commissioners of the District of Columbia have no power to bind the municipality by a contract under seal; but this claim proceeds upon a misconception of the large powers granted the Commissioners by the later enactments of Congress upon the subject, beginning with the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia" (16 Statutes, 419). By section 1 of this act it is provided that all that part of the territory of the United States included within the limits of the District of Columbia be created into a government, by the name of the District of Columbia, by which name

it was constituted "a body corporate for municipal purposes," with the power to make contracts, sue and be sued, and "to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States." A governor and legislature were created; also a Board of Public Works. To this board was given the control and repair of the streets, avenues, alleys, and sewers of the city of Washington, and all other works which might be entrusted to their charge by the Legislative Assembly or Congress. They were empowered to disburse the moneys raised for the improvement of streets, avenues, alleys, and sewers, and roads and bridges, and to assess upon adjoining property, especially benefited thereby, a reasonable proportion of the cost, not exceeding one-third. The acts of this board were held to be binding on the municipality of the District in Barnes *vs.* the District of Columbia, 91 U. S., 540.

This constitution lasted until June 20, 1874, when an act was passed entled "An act for the government of the District of Columbia, and for other purposes" (18 Statutes, 116). By this act the government established by the act of 1871 was abolished, and the President, by and with the advice and consent of the Senate, was authorized to appoint a commission, consisting of three persons, to exercise the power and authority then vested in the governor and the Board of Public Works, except as afterwards limited by the act. By a subsequent act, approved June 11, 1878 (20 Statutes, 102) it was enacted that the District of Columbia should "remain and continue a municipal corporation," as provided in section 2 of the Revised Statutes relating to said District, and the appointment of Commissioners was provided for, to have and to exercise similar powers given to the Commissioners appointed under the act of 1874.

See Metropolitan R'd *vs.* Dist. of Columbia, 132 U. S., 6.

Upon the exercise of the powers thus granted there were two important restrictions.

By section 37 of the act of February 21, 1871, it was enacted "That all contracts made by the said Board of Public Works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the secretary of the District, and said Board of Public Works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

("This section is deemed to be applicable to the present Commissioners." District of Columbia *vs.* Bailey, 171 U. S., 175.)

Again, by section 3 of the act of June 30, 1878, it was enacted "That all contracts for the construction, improvement, alteration or repairs of the streets, avenues, highways, alleys, gutters, sewers and all work of like nature shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

None of these elements to a valid contract binding on the municipality is lacking in the case now under consideration, for by an act of Congress approved March 3, 1887 (24 Statutes, 580), the sum of one hundred thousand dollars was appropriated for "repairing and laying new mains," and for "lowering mains," and for the employment of engineers and others under the water department of the District government.

That the contract was signed by all of the Commissioners and recorded in the book kept for that purpose was established by the testimony of William Tindall, secretary of the Board of Commissioners at the time of the trial, who "pro-

duced the original contract mentioned in the declaration in this cause, and testified that the signatures of William B. Webb, Samuel E. Wheatley, and William Ludlow to said contract number 815 were their genuine signatures, and that they were at the time of signing said contract Commissioners of the District of Columbia; that this contract had been duly copied in a book kept for that purpose in the office of the Commissioners, as required by the act of Congress approved June 11, 1878" (R., pp. 8, 9).

So there was ample provision of law at the time contract No. 815 was signed to authorize the Commissioners to purchase $20,000 worth of iron pipe for the extension of the water service.

But counsel for plaintiff in error contend that even if the Commissioners had power to enter into a contract for the purchase of pipe for "repairing and laying new mains," they were yet without authority to make such an instrument under seal, because that was not "*necessary* to the faithful administration of the valid laws enacted for the government of said District." If such a test is applied to all contracts with the Commissioners, then it becomes an extremely hazardous matter for any person, natural or artificial, to have contract relations with the District of Columbia.

The plaintiff in error could just as well contend that the record does not disclose any necessity for the purchase of water-main pipe from the Camden Iron Works, or that there was any *need* for twelve-inch pipe, rather than pipe of a less diameter, and consequently not so expensive.

As said by the learned Chief Justice who announced the opinion of the Court of Appeals (R., p. 62): "The municipal corporation has the right to adopt a seal, and from time to time to change it. It has the right, therefore, to execute contracts under seal." And it may well be that the Board of Commissioners, as constituted in the year 1887, and their predecessors in office, deemed it a matter of prudence to require that contracts calling for large expenditures of money should

be under seal, indicating a deliberate and solemn act, and implying that caution and fullness of assent had been observed and secured. Wherefore they established for such contracts a printed form of attestation, which, as it is fair to assume, from the fact that it is in print, is used in contracts for building sewers and such other public improvements as may run through several years. Such contracts in no way increase the liability of the municipal corporation. In the present case, the existence of a seal adds nothing to the cost of the iron pipe, nor does it take anything from the rigid requirements of the specifications in respect of its quality, or yet lessen the severe penalties prescribed for possible delays in delivery. It does, however, put it out of the power of the present Board of District Commissioners to effectually plead the statute of limitations in bar of an action for the recovery of a debt honestly due and owing by the municipality, incurred for the benefit of its citizens, and for material from which the District is regularly receiving a handsome revenue.

The case of District of Columbia *vs.* Bailey, 171 U. S., 161, decided that the Commissioners have no power to submit to arbitration "a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from a refusal to permit the performance of work and labor and the furnishing of materials." The court ruled that "no authority is conferred upon the Commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation has been made by Congress for the payment of any such claim."

But it is further contended that, even if the Commissioners have the power to execute a contract under seal, the contract in question is not so attested as to make it the sealed obligation of the District.

Several cases are cited which are supposed to controvert the decision of this court "that when a deed is executed or

a contract made in behalf of a State by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the State, notwithstanding that the officer may be described as one of the parties and may have affixed his individual name and seal" (2 Wallace, 187). But an examination of these cases discloses that they were decided on peculiar facts and circumstances, or that Randall *vs.* Van Vechten, 19 Johns. Rep., 60, was relied on as the sole authority. It is somewhat curious to note how the *dictum* of the court in this case has been followed in several of the States, and even referred to with approval by this court in Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21.

In Randall *vs.* Van Vechten, which was decided in 1821 and was an action of covenant, certain individual defendants were sued upon an agreement entered into by them as "a committee appointed by the honorable the corporation of the city of Albany," signed by them as individuals and having their individual seals attached. The court held, very properly, that the individuals were not personally liable unless they had acted without authority in making the contract. So far the decision of the court is in line with the ruling of Chief Justice Marshall in Hodgson *vs.* Dexter, 1 Cranch, 345, decided in 1803. But after deciding this, the only question at issue in the Van Vechten case, the court went on to advise the plaintiff how he might recover his demand by an action of *assumpsit* against the town, and added that the contract entered into by its committee was good as a simple contract, but was not binding on the corporation as a special contract, because a corporate seal is the only organ by which a body politic can covenant—a point not presented, and one not necessary to be decided in pronouncing judgment in the case.

But this ancient doctrine of the common law "has no application to corporations created by statute whose characters

contemplate the business of the corporation to be transacted exclusively by a special body or board of directors."

Fleckner *vs.* Bank, &c., 8 Wheaton, 357.

The court of appeals of New York, in 1883, referred to the case of Randall *vs.* Van Vechten as deciding that where it appears on the face of the instrument that the parties to be bound contracted with reference to corporate business, and that they had authority to make the contract, it is immaterial to inquire whether or not the contract is sealed, for the signers do not become individually liable. (See 94 N. Y., 150.) To that extent, and to that extent only, can the case be relied on as an authority.

The cases relied on by counsel for the plaintiff in error are all very unlike the case under consideration. Taking these up in the order in which they are found on the brief, and it appears that:

The case in Clark *vs.* Read, 12 D. C. App., 343, was an action in *assumpsit* against certain individuals and a corporation upon a promissory note endorsed by the defendant corporation, to which its corporate seal was attached. Objection was made to the admission of the note in evidence on the ground that it was a sealed instrument. The objection was overruled on the ground that the mere impression of the corporate seal does not of itself convert the simple contract into a specialty. The court say (p. 351): "The impression of a seal will not be given the effect of destroying a negotiable instrument when plainly such was not the intention of the parties."

In Levering *vs.* The Mayor, 7 Humph., 552, it was held that a parol defeasance cannot be pleaded at law to defeat an agreement under seal.

The case in 12th Mich. is commented on in brief, p. 16. It went off on a demurrer to the declaration.

In Blanchard *vs.* Blackstone, 102 Mass., 343, the court held that it was unnecessary in the decision of the case to

inquire whether or not the seals of the individual selectmen who signed the contract sued on were the seals of the town.

In Burrill *vs.* Boston, 2 Cliff. (C. C.), 590, suit was brought on a contract made by the mayor, which the court held he had no authority to make. There was in the case no question about seals.

The case of Caldwell *vs.* Manufacturing Co., 121 N. C., 339, went off on the failure of the corporation officers to execute a deed conveying real estate as required by the State Code.

In Danville Seminary *vs.* Mott, 136 Ill., 289, there was some question with regard to the absence of the corporation seal from a deed conveying its real estate; but the case turned on a ruling of the court that the board of trustees were without power to execute the deeds, and that the deeds did not divest the corporation of its title.

In Female Orphan Asylum *vs.* Johnson, 43 Me., 180, the asylum, by their managers, were authorized to bind to service children under their control. It was held that a contract signed Mary B. Storer, in behalf of the asylum, *was not authorized* by the act. (This case should be contrasted with the decision of the same court in Stinchfield *vs.* Little, 1 Greenleaf, 231.)

In Whitford *vs.* Laidler, 94 N. Y., 145, an action was brought against certain individuals on a written contract signed by them as officers of the "Garrettsville Agricultural and Farmers' Club" for the use of certain premises as a fair ground. *Held*, that defendants were not liable in their individual capacities, but that the corporation was liable in *assumpsit* as for use and occupation of the demised land.

In South Missouri Land Co. *vs.* Jeffries, 40 Mo. App., 360, a motion was made to dismiss the suit because the bond was not signed by any proper officer of the corporation. The signature was as follows: "So. Mo. Land Co. W. E. Drew, superintendent, A. G. Hollenbeck." The motion was sus-

tained in the lower court, but the ruling was reversed on appeal.

In Bank of Metropolis *vs.* Guttschlick, 14 Peters, 21, it appeared that G. had entered into an agreement with the bank for the purchase of a lot of ground in Washington. The agreement was signed on the part of the bank as follows:

"JOHN P. VAN NESS, [SEAL.]
"*President of the Bank of Metropolis.*
"ALEXANDER KERR, *Cashier.* [SEAL.]"

By this agreement the bank undertook to convey a fee-simple title to G., who paid the stipulated price. Subsequently G. was ousted of his possession by the holder of a paramount title, and thereupon brought suit in *assumpsit* against the bank as for money had and received. No point seems to have been made in the brief of counsel for plaintiff in error that the suit should have been in covenant on the agreement, in which nothing is said about returning the purchase price in case the title proved defective. The agreement was simply one link in the chain of evidence tending to show failure of consideration for the money paid by G. It was in no sense the *foundation* of the suit.

What the learned justice who announced the opinion of the court says touching the matter of seals was not necessary in the decision of the case and cannot be considered as an authority for the contention of plaintiff in error in the present case. Besides, it is at variance with the later decisions of this court.

See Sheets *vs.* Selden's Lessee, 2 Wall., 187.
Jacksonville, &c., R'w'y Co. *vs.* Hooper, 160 U. S., 514.

In State *vs.* Allis, 18 Ark., 269, there was a special act of the legislature authorizing a board of inspectors, consisting of the secretary of state, auditor, and treasurer, to enter into a contract for the care and management of the State

penitentiary. In pursuance of the authority thus conferred, a contract was made and signed as follows:

"D. B. GREER, *Sec'y State.* [SEAL.]
"C. C DANLEY, *Auditor.* [SEAL.]
"J. H. CREASE, *Treasurer.* [SEAL.]"

The court held the State not liable in an action of covenant on this contract, and for the reason that the context of the act explained "what extent of the power, with respect to the grade of the contract, the legislature intended to confer on the inspectors," and that this was a simple contract. Also that if the legislature had intended to confer power to make a sealed contract, they would "have so expressed the purpose in the act, and at the same time provided for the affixing of the seal of the State thereto by the governor or some one else."

The constitution of the State ordains that there should be a seal of the State, "which shall be kept by the governor and used by him officially." * * * The State "can perform no corporate or sovereign act except through her chief executive without it is verified by this seal; and we doubt, exceedingly, whether the legislature possesses the power by act to prescribe any other mode for the authentication of the sovereign or corporate acts of the State, except by means of the seal ordained by the constitution, and required to be kept, and, consequently, affixed by the governor."

The Bank of Columbia *vs.* Patterson's Adm'r, 7 Cranch, 299, decided that *indebitatus assumpsit* will lie against a corporation on a contract under seal after the work is completed and for extra work not called for by the contract.

In all of these cases it appeared that the several corporations, whether State, municipal, or other, had adopted some device for use as and for its corporate seal. But in the case at bar it appears that although the Board of Commissioners to be appointed under the tentative act of June 20, 1874, and

those to be appointed under the act of June 11, 1878, providing a permanent form of government for the District of Columbia, were given power to adopt a seal, no formal action was taken by either board looking to the adoption of any device as a seal until September 23, 1887, three months after the contract sued on was signed by the Camden Iron Works; and even after its adoption, as stated by the secretary, Mr. Tindall (R., p. 18), it "was not generally used" and only in some cases was it affixed to tax deeds executed by the Commissioners.

So the inference is inevitable that prior to September 23, 1887, the printed *testimonium* clause, as found at the end of the contract in question, was always used in sealed obligations of the District, at least in the absence of proof that some other device had been adopted and used; and no such proof was adduced at the trial. In such case, as was decided in the well-considered case of Reynolds' Heirs *vs.* Trustees, &c., 6 Dana (Ky.), 37, the courts will conclude that the individual names of the persons authorized to represent the corporation, to which scroll seals were attached, were intended as the corporate seals. In that case it appeared that a majority of the trustees of the Glasgow Academy joined in a deed conveying its real estate, signed with their names with scroll seals attached. Subsequently in an action of ejectment the validity of this deed was questioned, and the point was made that it did not purport to be executed under the corporate seal. In ruling that the deed was well executed the court say:

"The execution of the deed purports to be a corporate act. It is executed in the corporate name, by the majority of those persons who are constituted the body, and purports to be a conveyance of the donation lands vested in them as such.

"The deed throughout indicates a clear intention to convey, in their corporate, fiduciary character, as trustees, and not as individuals; and in the conclusion they have not denominated the seals by which they testify it their *individual* seals. Inasmuch, therefore, as they had the right to

adopt the scroll as their seal—and it does not appear that they had any other seal as a corporation—and the act attempted to be done is a corporate act, and in the name of the corporate body, and done by those entrusted with the powers conferred by the act, and they have not denominated the scroll their individual seals, we may well intend the scrolls were used as their corporate seal.

"To presume that they are their individual seals would be to presume that which they have not said, and which would be repugnant to the manifest intention of the parties and the whole object and tenor of the instrument. To indulge in such presumption would be to destroy and not to sustain the deed—to defeat the intention of the parties, and not to carry it into effect. Such presumption should not, therefore, be indulged, or such construction given to the deed or the scrolls which are used. As the scrolls may be used by a corporation, we should rather presume that they were used as their corporate seal, especially as that presumption supports the deed and comports with the clear object of the instrument.

"The fact that separate scrolls are attached to the names of each of the trustees can make no difference. If the scroll used was intended to be the seal of the corporation, its repetition cannot detract from the validity of the deed. And as several individuals conveying, as such, might adopt a single seal, or separate seals for each, and the deed would be good, so all the corporators might use a single corporate seal, or attach the corporate seal to each name signed to the instrument; and as the trustees, in this case, deemed it necessary for each trustee to sign his name, it may have been deemed equally necessary for each to attach the corporate seal."

Much stress is laid in the brief of counsel for the plaintiff in error on a supposed modification by parol of the covenant sued on; but the record discloses no such modification, and the brief fails to point out or suggest in what particular the contract was modified.

True it may be that the defendant in error determined in August of 1887 to abandon the contract, when the Commissioners insisted that the man Hoyt should inspect the pipe

and report to them whether or not it came up to contract requirements. This because, owing to the delay on the part of the District, it was considered impossible to cast the large quantity of pipe called for by the contract, and as much more as Hoyt might see fit to reject, within the time limited. As shown by his subsequent conduct, and as pointed out by Mr. Wood in his letter of September 6, 1887, Hoyt was "not a proper man for the position" (R., p. 26).

At the Ludlow interview, some days later (R., p. 35), no formal agreement was entered into and no modification of the covenant was made or attempted. All that Colonel Ludlow agreed to on that occasion was that "no injustice would be done the plaintiff." That he did not consider this a modification of the covenant is shown by his subsequent conduct in imposing full penalties for delay in delivering the pipe, according to the strict letter of the contract.

But this interview was not referred to in the instructions to the jury granted at the request of the plaintiff below, nor in the charge of the court, nor yet was it claimed or pretended at the trial that it worked a modification of the covenant. There was also an utter absence of proof tending to show when the contract was signed by Mr. Webb, one of the Commissioners. Until he signed, it was not an executed contract. There was, therefore, no date fixed by the proofs at which the 136-day period given for full performance should begin. So the District failed to show the slightest justification for imposing any of the penalties prescribed by the contract.

The discharge from full performance consequent upon Captain Symons' telegram of December 2 (R., p. 33) made no change in the District's liability on the covenant, and for the reason that the contract provided that "payments will be made after August 1 and September 15 for all pipes, valves, and castings received and accepted in proper order and condition," less 20 per cent., &c. The action of covenant might, therefore, have been invoked,

after each delivery of pipe, for the contract price of such delivery, had payment been demanded and refused. That there was subsequently a "satisfactory completion" of the contract, entitling the contractors to demand the 20 per cent. reserved, is abundantly shown by the conduct of the District officials at the time. It was at their request that no more pipe was cast; but this made no change in the covenant to pay the contract price for such as might thereafter be "received and accepted."

The only other feature of the dealings between the District and the contractors, from which a parol modification of the covenant can be claimed, is the correspondence between Captain Symons and Mr. Wood, beginning with the telegram of November 30th (R., pp. 32, 33). The request of Captain Symons that no further pipe be cast was acceded to by Mr. Wood, with the proviso that all pipe then "cast shall be taken and paid for at the regular contract price, without any deduction." To this proviso the Enginneer Commissioner did not directly assent, but by a letter dated December 2 he directed the contractors "to send on and deliver the pipe which is now made and accepted by our inspector" (R., p. 34). In the light of this correspondence, it was contended by the plaintiff below that the District was estopped from claiming penalties as for delay in the subsequent deliveries of pipe, and at the plaintiff's request an instruction to the jury was given, predicated of "silence and conduct," not *contract* (R., p. 52). To adopt the quaint language of Lord Coke, the jury were told that "a man's owne act or acceptance stoppith or closeth his mouth to alleage or plead the truth."

However this be, the plaintiff in error cannot be heard to complain, because, as has been shown, it failed to adduce any evidence tending to show at what time the 136-day period provided for performance should begin. Till this was done, there was no predicate for the imposition of fines and penalties as for delay in performance of the contract.

Nothing is claimed in the suit except that the plaintiff in error shall pay for the pipe, accepted by its inspector and subsequently delivered, the price stipulated in the special contract. And the District of Columbia so far waived "absolute performance as to consent to be liable on its covenant for the contract price" of the material actually delivered.

See Phillips, etc., *vs.* Seymour, 91 U. S., 651.

It is also claimed in the brief of counsel for defendant in error that the plaintiff below was guilty of laches and should not, therefore, have interest on its demand, and for the unique reason that it "acquiesced in the settlement of the account, abandoned its claim against the defendant, and appealed to Congress for relief." But this contention is not well founded, for it appears that immediately upon receiving the District auditor's statement of the account, officers of the Camden Iron Works came to Washington and protested against the utter confiscation of their material, as shown on that statement. Its president, Mr. Wood, made two trips to Detroit to see Colonel Ludlow, in the hope that he would, though no longer the Engineer Commissioner, recommend a readjustment of the account. Though he declined to do this, efforts were still made by letter and personal solicitation to have the account properly stated, without avail, and it was not until November 21, 1892, that the Commissioners finally declined to restate the account and pay for the pipe.

In the same letter the defendant in error was advised by the Commissioners to apply to Congress for relief. In all of this there is no evidence of laches on the part of the defendant in error. The appeal to the courts was made as soon as it was found that payment could not be secured in any other way. Even this has proven a slow process, for already nearly six years have passed since the suit was begun.

To again refer to the opinion of Agnew, J. (62 Pa. St. 307), the defense to this action "is an attempt to impale an honest debt on the sharp points of the law, which ought not to succeed, and we think the corrective power of the court is sufficient to prevent it."

Wherefore it is respectfully submitted that there is no error in the record, and that the judgment of the court below should be affirmed.

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